UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

SIEMENS LOGISTICS, LLC

Employer

and **Case 32-RC-256264**

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39, AFL/CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Siemens Logistics, LLC[1] (the Employer) provides baggage handling operation and maintenance services at six locations in the United States (Tr. 12:10), including at the Oakland International Airport (OAK) in Oakland, California. OAK is operated by the Port of Oakland. On February 12, 2020, the International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO (the Petitioner) filed a petition with the National Labor Relations Board (Board) seeking to represent all full-time and part-time Mechanics A, Mechanics B, and Mechanics C (also known as baggage technicians) employed by the Employer at OAK, excluding professional employees, confidential employees, office clerical employees, guards, and supervisors as defined in the Act. The parties agree that the unit sought by the Petitioner is an appropriate unit. The parties further agree that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The only issue presented is whether the Board has jurisdiction over the Employer.

A hearing officer of the Board held a hearing in this matter, and the parties orally argued their respective positions prior to the close of the hearing. The Employer contends that the Board does not have jurisdiction over the Employer; instead, the Employer submits that it is subject to the jurisdiction of the Railway Labor Act (RLA) and thus subject to the jurisdiction of the National Mediation Board (NMB). The Petitioner disagrees and argues that the NLRB has jurisdiction over the Employer and that an election should be directed in the petitioned-for unit.

For the reasons stated below, I have concluded that the Board has jurisdiction over the Employer.

[1] The initial petition for representation named the Employer as "Siemens Postal, Parcel & Airport Logistics, LLC." However, the parties filed a joint motion to amend the name to "Siemens Logistics, LLC." To the extent it was not previously granted, I grant the parties' joint motion to amend the petition by amending the Employer's name to "Siemens Logistics, LLC."

I. Overview of Operations

Southwest Airlines (Southwest) contracts with the Employer to operate and maintain the baggage handling system (BHS) of Terminal 2 (Southwest Terminal) at OAK. Each day from opening to closing, the Employer is responsible for ensuring that the Southwest Terminal BHS is operating. The BHS handles the flow of bags from the ticket counter, through the baggage screening matrix where Southwest employees take bags off carousels and place them on baggage carts. The Employer is also responsible for the maintenance and operation of air hoses and trolleys on jet bridges, the passenger loading bridge that passengers use to climb onto an aircraft. The Employer is not an air carrier within the meaning of the RLA.

The Employer has four divisions: Airport Logistics (responsible for the design, construction, and installation of baggage screening systems); Postal Group (responsible for the design and construction of mail sortation machines); Parcel Division (responsible for the design and construction of parcel sortation equipment); and Customer Service Group (responsible for providing customer service to the first three divisions). At OAK, the Employer employs approximately 9 people: one site manager and eight technicians. The petitioned-for unit is part of the Customer Service Group.

II. Relevant Legal Standard

The National Mediation Board (the NMB) is endowed by the Railway Labor Act (RLA) with jurisdiction over common carriers by rail and air engaged in interstate or foreign commerce. Section 2(2) of the National Labor Relations Act defines "employer" to exclude from coverage "any person subject to the Railway Labor Act." 29 U.S.C. §152(2). Similarly, Section 2(3) of the defines "employee" to exclude from coverage "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. §152(3); see also *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1139-1140 (D.C. Cir. 2017). The RLA, as amended, applies to:

> "…every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service."

45 U.S.C. §151 First and 181.

When an employer is not itself a carrier, the NMB applies a two-part test to determine whether that agency nonetheless has jurisdiction over the employer. First, the NMB determines whether the work the employer performs is traditionally performed by carrier employees. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be met for the NMB to assert jurisdiction. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006). In determining whether the second part of the test is satisfied, the NMB holds that, "the … carrier must effectively exercise a significant degree of influence over the company's daily operations and its employees'

performance of services in order to establish RLA jurisdiction." *ABM Onsite Services-West*, 45 NMB 27, 34 (2018). Factors the NMB has traditionally considered in making this latter determination include (1) the extent of the carrier's control over the manner in which the company conducts its business, (2) the carrier's access to the company's operations and records; (3) the carrier's role in the company's personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of carrier control over employee training. No one factor is elevated above all others. *Id.* at 34-35; see also *Oxford Electronics, Inc.*, 369 NLRB No. 6 (January 6, 2020).

In determining whether Section 2(2) and (3) of the Act preclude the Board from exercising jurisdiction over an employer, the Board gives "substantial deference" to NMB advisory opinions regarding RLA jurisdiction. See, e.g. *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003). However, "there is no statutory requirement that the question of jurisdiction be submitted for answer first to the NMB." *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072 (6th Cir. 1971). Indeed, "[t]he Board and the NMB each has independent authority to decide whether the RLA bars the [Board's] exercise of jurisdiction." *Allied Aviation Service Co. of New Jersey v. NLRB*, 854 F.3d 55, 62 (D.C. Cir. 2017). The Board will not refer a jurisdictional question to the NMB where a case presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction. See *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002). Likewise, the Board will not refer a case which "involves employees of an air carrier who are in no way engaging in activity involving airline transportation functions and whose work normally would be covered by the NLRA." *United Parcel Service, Inc.*, 318 NLRB 778, 780 (1995) (citing *Golden Nugget Motel*, 235 NLRB 1348 (1978) and *Trans World Airlines*, 211 NLRB 733 (1974)).

Here, the Petitioner seeks to represent a unit consisting of employees who maintain and operate the Southwest Terminal BHS at OAK pursuant to a Master Services Agreement (MSA) and OAK-specific services agreement (OAK-SA) between Southwest and the Employer for the provision of such services. While Southwest is clearly an airline under jurisdiction of the NMB, the Employer does not meet the definition of a common carrier under the RLA because it does not fly aircraft and is not directly or indirectly owned by an air carrier. See *Airway Cleaners*, 41 NMB 262, 267 (2014). However, the Employer provides services to Southwest (an air carrier) at OAK. Therefore, for purposes of this decision, I will apply the two-part NMB test to determine whether the Employer is subject to the jurisdiction of the NMB. If the question is answered in the negative, the Employer stipulates that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. Jurisdiction

A. Facts

1. Work Traditionally Performed by Employees of Carriers

The Employer has eight or nine competitors in the country that perform BHS-type work for air carriers. According to the Employer's Senior Director of Airport Customer Service Operations John Conlon, whether an air carrier maintains and operates its own BHS varies from

airport to airport depending upon whether it has control over the BHS equipment. Whether an air carrier maintains and operates its own BHS is dependent upon whether its lease provides for an airport to control the function. At OAK, Southwest's lease with the Port of Oakland places the responsibility for operation and maintenance of the BHS on Southwest. The record does not state specific examples of the nature and extent of other air carriers' performance of the Employer's work performed at OAK. However, as is the case with its operation at OAK, the Employer performs BHS maintenance, construction, and design for United Airlines and Southwest at several other airports. The Employer only services one of two airport terminals at OAK. The record does not contain information concerning whether the airlines operating out of the second terminal at OAK perform the BHS themselves or contract out for BHS operating and maintenance services.

2. Carrier Control over the Employer

The Employer's contractual relationship with Southwest for the performance of BHS-related work is governed by the parties' MSA and OAK-SA, which were drafted by Southwest. The MSA contains the terms of the relationship between the Employer and Southwest, including the terms of Southwest's relationship to the Employer's employees, for any airport used by Southwest that is serviced by the Employer. Though the agreements were drafted by Southwest, they were negotiated with BHS and contain various terms concerning the consideration paid by Southwest to the Employer for its BHS-related services at OAK.

a. The Employer's Daily Operations vis-á-vis Southwest

Southwest is an air carrier that uses OAK for flights and contracts with the Employer for specific services concerning the operation and maintenance of its BHS at OAK. Besides the daily operating of the BHS, the Employer is responsible for preventative and corrective maintenance of the BHS, the latter of which occurs when the BHS unexpectedly encounters a maintenance issue. Every month, the Employer's on-site manager provides a report to Southwest with a day-by-day accounting of bag jams. In turn, Southwest uses this data to prepare maintenance work orders for the following month. Maintenance work orders for maintenance are sent by Southwest to the Employer through a Computer Maintenance Management System (CMMS).[2] These work orders generally form the basis of the typical preventative maintenance performed by the Employer through the MSA and OAK-SA. When a work order is made by Southwest through the CMMS, the order is sent to the site manager electronically who assigns the work to an employee. Though preventative work orders are generated at the start of a month, their timeframe for completion is the end of the month. There is no other separate requirement concerning the order of completion of preventative work orders. Preventative maintenance orders have specific tasks that need to be completed, some of which are selected by Southwest and some directly by the equipment manufacturer's recommendations for service. Southwest's Regional Technical Manager Kevin Patton inspects the Employer's general work performance through unannounced visits. Patton visits between one and three times per month and will generally only speak with the Employer's

[2] Although at other facilities the Employer itself operates the CMMS, Southwest at OAK is responsible for control over the set-up of the CMMS used by both Southwest and the Employer.

site manager or lead if the site manager is not present. The duration of Patton's monthly inspections is unknown.

Preventative and corrective maintenance is performed both with and without Southwest's involvement. For example, the Employer approves overtime as needed to meet its obligations under the MSA, and therefore, Southwest is not involved in the granting or providing compensation for overtime to employees to cover a shift for an employee calling out sick. However, there are some instances in which the payment of overtime wages for the petitioned-for unit employees must be approved in writing by Southwest but only in situations outside the Employer's control, such as in the case of a systems failure. In this situation, Southwest would only be involved to reassess staffing levels. Orders for parts are also sent in writing to Southwest, which generally provides the parts to the Employer unless there is an urgent need for a part, and it is not available immediately from Southwest's inventory. If the Employer determines that additional repair work is needed on a job, an additional work request is sent to Southwest for approval. The Employer may also work with Southwest by consulting with a Southwest technical manager to work out logistical issues concerning a repair. Though Southwest prescribes response times for the clearing of jammed bags in the BHS, the evidence does not establish the nature and extent of Southwest's monitoring or involvement in the adherence to such requirements.

Pursuant to the MSA, the Employer is required to have a minimum threshold of liability insurance and other types of insurance such as workers' compensation insurance. The Employer must provide copies of its coverage to Southwest though the evidence does not establish that Southwest is otherwise involved in the Employer's selection of specific carriers or plans.

b. Access to the Employer's Operations and Records

The Employer operates a control room as its main office at OAK, an employee break room, and a parts storage area where parts and tools are stored. The Port of Oakland provides these areas to Southwest as part of its lease to operate the Southwest Terminal. Southwest, in turn, provides the space to the Employer. Though Southwest has access to these areas, the record does not specify the nature and extent of Southwest's access of these areas as well as the extent of its control over the three areas used by the Employer at OAK. Thus, the Employer's employees only have access to the areas necessary to perform their work operating and maintaining the BHS.

Under the MSA and OAK-SA, the Employer is responsible for maintaining employment-related records. The Employer's records are maintained at its own central location in Dallas, Texas. Though Southwest has a right to inspect or audit the records, Southwest has never exercised its right to inspect personnel records except concerning timekeeping and payroll records.

The Employer uses equipment owned by the Port of Oakland (the BHS equipment). Necessary repair parts are generally secured directly from Southwest (through a Southwest procurement team) unless there is an emergency and the parts are not available directly from Southwest. At OAK, the Employer is responsible for managing and maintaining an inventory of parts once those parts are obtained directly from Southwest. In order to satisfy its inventory maintenance responsibilities, the Employer receives a set minimum and maximum threshold for

the amount of parts from Southwest. The Employer provides its employees with its own computer equipment to perform their work, which employees use to access the CMMS for inputting maintenance related data. When required, employees use one Southwest-provided maintenance laptop solely for performing work on one specific piece of equipment (the programmable logic controller). The Employer purchased its own radio equipment but was reimbursed by Southwest for the purchase. The Port of Oakland governs the use of specific radio frequencies for communication, which Southwest licenses from the Federal Communications Commission (FCC) for use at OAK. The Employer has designated sub-frequencies for its own use apart from the frequencies used by Southwest. The Employer has acquired one service vehicle for its use on which it placed a magnetic "Siemens" logo.

c. Role in the Employer's Personnel Decisions

Under the MSA and OAK-SA, the Employer is solely responsible for the hiring, payment, supervision, discipline, and all other personnel functions and decisions associated with employees of the Employer. Beyond basic personnel functions, the MSA and OAK-SA require that the Employer be solely responsible for timekeeping[3], performance management, violations of statute and all other employment-related functions. The MSA and OAK-SA also provide for specific job classifications and duties associated with each job but do not provide for specific rates of pay. Rates of pay and benefits are determined at the sole discretion of the Employer based upon the amount it charges Southwest per employee plus the Employer's self-determined overhead and profit margin. The Employer does not provide Southwest with a total breakdown of its costs, including labor costs. To increase its employees' rate of pay or benefits, the Employer requests a general increase in the value of a contract but does not request specific increases for individual employees. In the only instance of a wage increase during the life of the current OAK-SA, the Employer approached Southwest about increasing its bid rate in order to raise employee wages due to the Employer's efforts to retain employees and reduce attrition. The Employer provides its employees with health insurance, matching 401(k) contributions, paid time off, and employee profit sharing, and Southwest plays no role in the provision of such benefits to employees, including the selection of specific benefit offerings and eligibility to participate in employee benefits. Likewise, Southwest plays no role in the approval of employees' requests for paid time off.

Hiring decisions are made solely by the Employer. Employee onboarding is done by the Employer's human resources department, which provides new employees with the Employer's employee handbook. The Employer places its own advertisements for an open position when it conducts hiring. Applications are received through the Employer's website, screened by the Employer's own human resources department, and then forwarded to the Employer's on-site manager Bryant Davis who interviews applicants and makes the hiring decision. However, the Employer's employees are required to undergo both a Southwest and Port of Oakland background screening and must also successfully pass a drug test. After the initial Southwest background screening is completed, employees go through a secondary Port of Oakland background screening

[3] Employees keep track of their time using an Employer-only biometric clock that Southwest employees do not use.

to obtain their photo identification. There is no evidence in the record that Southwest or the Employer requires any additional background screening or drug testing that is not otherwise required of any other individual working at an airport.

The MSA and OAK-SA sets the general hours, minimum number of employees at OAK employed by the Employer, and specific job classifications employed at OAK. The MSA and OAK-SA does not mandate a ceiling for the number of employees but does require approval by Southwest if the Employer wants to add additional employees. The MSA and OAK-SA also outline minimum job requirements such as age (18 or older), level of education (high school degree or equivalent), work authorization (U.S. citizen or otherwise authorized to work in the U.S.), interpersonal skills (have good oral communication and human relations skills), mental and physical condition (must be "good"), and be able to communicate effectively in English. Except for the education requirement, the other job requirements are required by federal law. The high school diploma requirement is required by the Employer and not Southwest. The Employer has waived the requirement for a high school diploma at other airports based on an employee's or applicant's experience.

Southwest does not play any direct role in firing or recommending the firing of employees. The MSA explicitly states that Southwest "shall not have the authority to hire, fire, or discipline any [employee of the Employer]" and neither the Employer nor Southwest has deviated from this provision. The only contractual role Southwest plays is to retain the right to request, in writing, the dismissal of an employee of the Employer under three limited circumstances: (1) the employee is charged or implicated in a criminal offense; (2) the employee "is deemed not qualified or necessary to perform the work assigned; and (3) the employee diminishes the harm or reputation of Southwest. However, Southwest has never exercised its right to make a written request for the dismissal of any of the Employer's employees. If Southwest removed its sponsorship of an employee's badge, the Employer would still investigate concerning the reasons for the removal of sponsorship and, depending on the outcome, decide whether to terminate an employee. If Southwest requested the removal of an employee, the decision on whether to terminate or reassign the employee elsewhere within the Employer's other operations rests with the Employer. The Employer has its own disciplinary procedure for issuing employee discipline. The Employer's disciplinary process does not involve Southwest.

The MSA and OAK-SA require that the Employer's employees abide by federal workplace safety requirements but does not outline any specific additional or separate Southwest workplace safety requirements that the Employer's employees are required to follow. The MSA and OAK-SA require the Employer and its employees to adhere to a conflict-of-interest policy. Besides a notification requirement of workplace injuries, Southwest is not otherwise involved in the reporting or investigation of the petitioned-for unit employees' workplace injuries.

d. Degree of Supervision Exercised

Southwest has no direct role or control in the supervision of the Employer's employees, which is done by the Employer's own on-site management. Under the MSA and OAK-SA, Southwest sends preventative and corrective maintenance work orders to the Employer through its

CMMS at the start of the month for completion throughout the month. For corrective maintenance orders such as when there is a bag jam, either Southwest or the Employer will generate a work order that outlines the repair needs. The Employer's on-site management has control over distributing and assigning the requirements of a work order to employees based on the scheduling of its workforce without any involvement from Southwest. Southwest does not move the Employer's employees from one location to another. Southwest monitors the general performance of the Employer's operations but the record does not contain any evidence that it monitors the individual performance of any of the Employer's unit employees. Rather it monitor's the performance of the Employer's regional managers, who are not part of the petitioned-for unit for compliance with the MSA. In this regard, the only specific instance of Southwest requesting that one of the Employer's employees receive performance-based training involved a site manager who was not part of the petitioned-for unit. Likewise, discipline of unit employees is done solely by the Employer.

On a typical day, the Employer's employees have no interactions with Southwest supervisors. The employees' interactions with Southwest supervisors occur when there are events or irregular operations, which are mechanical or electrical problems that affect the operations of the BHS. When this occurs, the Employer's lead or site manager notifies a Southwest shift operator of the maintenance or electrical problem. The Employer's lead or site manager tells the Southwest supervisors how long it will take to fix the problem, what the contingency plan is in the event of an inability to fix the problem forthwith and decides whether to implement the contingency plan. The two general contingency plans are either using a different conveyer belt or requesting that police search bags using canines. The use of a contingency plan is a decision made by the Employer's lead or site manager. Southwest is not generally involved in the decision to implement a contingency plan.

Though there was one specific example of the involvement of Southwest Regional Technical Manager Patton in the adjustment of a workplace matter concerning an irregular occurrence, Patton dealt directly with the Employer's lead instead of going through its site manager. In that one instance, the Employer's lead, in turn, involved the site manager after the interaction.

e. Control Over Training

Pursuant to the MSA, the Employer is responsible for training its employees. Southwest does not regularly provide training to the Employer's employees. Employee training, including new employee training and workplace safety training, is typically done on-the-job by other Siemens employees or via Employer-provided training. The Port of Oakland requires separate training for new employees concerning the use of their badges. Additionally, via the MSA and OAK-SA, the Employer has agreed that its employees be provided original equipment manufacturer (OEM) training, which is either provided directly by a third-party equipment manufacturer or handled internally. The only evidence in the record of Southwest's involvement in content-specific training is its provision of maintenance manuals that came with the original BHS equipment. Though Southwest provided an operating procedure manual to the Employer, there was no evidence that Southwest directed that it be used for required training of any of the

Employer's unit employees, or whether the manual itself is a Southwest operating procedure manual or merely a generic operating procedure manual governing all individuals conducting work at the airport.

f. Whether the Employees are held out to the Public as Carrier Employees

Employees in the petitioned-for unit do not generally interact with the public. The employees generally perform their work in non-public areas. Southwest requires that the Employer's employees wear a photo identification badge that complies with both Southwest and federal governmental agency requirements for badges. The employee identification badges say, "Southwest Airlines," do not contain the words "Siemens," and are issued by the Port of Oakland, not Southwest. The reason for the reference to "Southwest" on the employee badge is because Southwest is the sponsoring entity for the badge. Furthermore, employee uniforms are not provided by Southwest nor is their specific design selected by Southwest, which does retain the right to approve the appearance of the Employer's employees. The uniforms say "Siemens" and the employee's name and do not say "Southwest" or "Southwest Airlines." The Employer's uniforms differ in color from the Southwest uniforms.

B. Legal Analysis

To establish that NMB has jurisdiction over an employer, the employer must both perform work that is traditionally performed by carrier employees and the employer must either directly or indirectly be owned or controlled by a carrier or carriers. *Air Serv Corp.*, 33 NMB 272, 285 (2006). The Petitioner contends that the Employer neither performs work that is traditionally performed by an air carrier nor is controlled, directly or indirectly, by a carrier. For the reasons stated below, I find that Southwest does not exercise sufficient control over the Employer to establish RLA jurisdiction.

1. The Employer Performs Work Traditionally Performed by Air Carriers

Based upon the uncontradicted evidence in the record, I find that the Employer is engaged in work that has traditionally been performed by air carriers. *Air Serv Corp.*, 33 NMB 272, 285 (2006). The record disclosed that the BHS operation and maintenance work is traditionally performed either by the air carrier itself or through contractual agreements with one of 10 private companies such as the Employer who bid to perform the work. The record further establishes that the Employer itself performs the same kind of work at other airports around the United States. Other workers engaging in the operating of airport baggage handling systems have been found to have engaged in work that is traditionally performed by air carriers. *ABM-Onsite Services*, 45 NMB 27 (2018); *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35 (2018). Though the Petitioner contends that the Employer has not demonstrated that its work is traditionally performed by air carriers, it points to no specific authority or record evidence to support its conclusion. Consequently, I find that there is sufficient evidence in the record and applicable case law, noted above, to support the conclusion that the operation and maintenance of the BHS is work that is traditionally performed by air carriers.

2. Southwest does not Exercise a Sufficient Level of Control to Establish RLA Jurisdiction

The record in this case demonstrates that Southwest does not exercise a sufficient amount of control over the Employer to establish RLA jurisdiction. The Employer's contracts and its relationship with Southwest are comparable to the relationships described in recent cases where the NMB concluded that it lacked jurisdiction. See e.g. *Bags, Inc.*, 40 NMB 165, 169-170 (2013). Here, examining each factor identified in the NMB's test, the weight of the record evidence leads me to conclude that Southwest does not exercise sufficient control over the Employer necessary to meet NMB's jurisdictional requirements and thus that the Employer is subject to the jurisdiction of the NLRB.

First, considering the extent of Southwest's control over the manner in which the Employer conducts its business, the Employer generally operates its business pursuant to the parameters of the MSA and OAK-SA. Though the Employer has specific general productivity measurements under its contractual obligations with Southwest, the Employer is responsible for its own day-to-day operations, such as assigning staff in order to meet its contractual obligations of operating and maintaining the Southwest Terminal BHS. Moreover, although Southwest sends monthly maintenance requests, the method of completing the maintenance, as well as the prioritizing and assignment of such requests, are within the exclusive purview of the Employer. Except monitoring the general performance of the Employer under the parties' contract, the record did not disclose any evidence that Southwest monitored any individual employee's performance. Under the MSA and OAK-SA, the Employer is responsible for the training of its employees, which is conducted without the involvement of Southwest through either on-the-job training or through third-party vendors such as equipment manufacturers. The only specific example of Southwest's involvement in how the Employer conducts its business was an instance concerning the Employer's on-site manager, which was akin to a complaint by Southwest concerning the Employer's contractual performance obligations. In that instance, the Employer agreed to retrain its on-site manager. Evidence that a contractor undertook steps to improve its overall performance in response to a carrier's complaints about a site manager does not demonstrate a sufficient amount of control over how the Employer conducts business to warrant RLA jurisdiction. See e.g. *Huntleigh USA Corporation*, 40 NMB 130, 134 (2013) (employer responded to carrier's complaints regarding insufficient number of wheelchairs; no RLA jurisdiction found).

Addressing the second factor, the Employer is responsible for creating and maintaining all of its own records. Except for providing parts and a laptop necessary for use on specific equipment, the Employer provides its own equipment to its employees such as uniforms, laptops and a company vehicle. Moreover, the Employer's employees only have access to a limited portion of Southwest's operations at OAK, limited to those areas necessary for performing their operating and maintenance duties of the BHS. Employee records are maintained at the Employer's offices in Dallas, Texas. Though Southwest has a right to inspect certain employment-related records, it may only do so upon written request, which it has only exercised pertaining to timekeeping and payroll records. As the leaseholder with the Port of Oakland, Southwest provides the Employer with a control room, an employee breakroom, and a parts storage area where the Employer stores

parts and equipment. However, there is no evidence in the record to establish that Southwest exercises any control, let alone meaningful control, over the space it has afforded the Employer to conduct its operations. Such level of access amounts to an ordinary level of control between a service provider and a customer not sufficient by itself to establish RLA jurisdiction. *Huntleigh USA Corp.*, 40 NMB 130, 134 (2013) (airline provided office as a courtesy to employer's terminal operations manager, made specific training requirements, and had contractual right to audit training records).

Considering the factor which looks to carrier control over an employer's personnel decisions, an employer must exercise a significant degree of influence over personnel decisions in order to warrant RLA jurisdiction. *ABM-Onsite Services*, 45 NMB 27, 34-35 (2018). Here, the record does not establish that Southwest exercises any significant influence or control over the Employer's personnel decisions. Southwest plays no role in posting job openings, interviewing candidates, screening candidates for job requirements, the decision to hire a candidate, assigning employees to job tasks, disciplining employees, or terminating an employee's employment with the Employer. Though the MSA sets a limited number of minimum job qualifications for employment, the requirements are either set by federal law or are required by the Employer, not Southwest. The Employer has its own human resources department, which conducts employee onboarding without the involvement of Southwest. Southwest has no control over the selection of the rates of pay or benefits of the Employer's employees. Though the Employer asserts that Southwest has direct control over the rate of pay because its bid amount is based off the rate of pay, it is the Employer's economic decisions concerning its profit margin and overhead that govern the amount it pays its employees.

In certain limited circumstances which Southwest has not exercised, Southwest can request that an employee be dismissed from assignment at OAK, but whether that employee is terminated by the Employer remains within the Employer's discretion. In *Menzies Aviation, Inc.*, 42 NMB 1, 5 (2014), the NMB found no RLA jurisdiction notwithstanding a contractual right to demand removal of a subcontractor's employees because, as is the case here, the Employer retained the right to assign the employee to another position. Unlike in *Aircraft Services Int'l*, 32 NMB 30, 33 (2004) where the NMB found RLA jurisdiction because the carrier had control to absolutely remove an employee from the Employer's employ, the Employer here has retained the right to make all disciplinary and termination decisions. Moreover, Southwest does not control the number of personnel (except to require a floor for the number of technicians) nor does it control changes in personnel.

The Employer asserts that *John Menzies*, 31 NMB 490 (2004) and *VGR International*, 27 NMB 232 (2000) support its contentions that the record here supports a conclusion that Southwest exercises a significant amount of control over the Employer, notwithstanding that Southwest does not provide input into the hiring and firing of employees. However, the Employer's reliance on these cases is misplaced. In *John Menzies*, the carrier's control over the employer was much more significant than the record reflects here because the carrier regularly audited the employer's records and provided regular written evaluations based on its audits, had a significantly broader contractual provision concerning the removal of employees, there existed evidence of several instances where employees were terminated at the request of the carrier, the carrier met daily with

the employer to discuss operational needs, the carrier's employees interacted and directed the employer's employees regularly during the course of their work, and held monthly safety related meetings. *John Menzies*, 31 NMB at 496. Likewise, in *VGR International*, the record evidence established that, unlike here, the carrier could effectively recommend assignments and reassignments, trained the employer's employees, interacted directly with the employer's employees, and were required to follow the carrier's policies and procedures. When considering the record as a whole, I cannot conclude that Southwest exercises significant control over the Employer's personnel decisions.

Considering the fourth factor concerning the degree of supervision over the Employer's employees, I do not find that the Employer exercises any significant control over the supervision of the Employer's employees. The Employer has its own management structure at OAK, which includes an on-site manager and a lead. Though Southwest has a manager that performs random inspections of work performance, such random inspections occur only between one and three times per month for unknown durations and Southwest's interactions are limited to the on-site manager or lead. Southwest monitors general performance of the Employer's obligations under the MSA and OAK-SA but does not otherwise monitor individual employee performance. Moreover, there is no evidence that the Employer's employees are bound by Southwest's employee policies, that Southwest attends staff meetings, or otherwise directly supervises the Employer's employees.

Next, examining the carrier's control over training, Southwest has little involvement in the training of the Employer's employees. All training is conducted by either the Employer directly or by third-party equipment manufacturers. Though Southwest offers equipment manuals to the Employer, the record does not contain evidence that Southwest conducts any specific training on the manuals or the operation of the BHS. To the extent the MSA and OAK-SA require any training, such training is not required under federal law. The level of control over training exerted by Southwest is not significant here.

Finally, considering the sixth and final factor, the Employer's employees are not held out to the public as carrier employees. The Employer's employees do not generally interact with the public because their work operating and maintaining the Southwest Terminal BHS is generally performed in non-public areas. The employees wear the Employer's uniforms, which say the Employer's name and are a different color than Southwest employee uniforms. Although the Employer's employees have badges that say, "Southwest Airlines," the record disclosed that this is merely a function of Southwest being the Employer's sponsor for badging purposes rather than an effort to hold out the Employer's employees to be Southwest employees. Moreover, the fact that the Employer's employees have their own breakroom, wear different uniforms, use a different timekeeping system, and utilize a company vehicle with the Employer's logo weigh against finding RLA jurisdiction.

In conclusion, the record here is factually similar to cases where the NMB has found no RLA jurisdiction and the record here also differs materially to cases where the NMB has found RLA jurisdiction. *ABM-Onsite Services*, 45 NMB 27 (2018); *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35 (2018). Accordingly, I conclude that the Employer is subject to NLRA jurisdiction and this case should not be referred to the NMB.

IV. Conclusions and Findings

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Mechanics (Baggage Technicians) A, Mechanics (Baggage Technicians) B, and Mechanics (Baggage Technicians) C employed by the Employer at the Oakland International Airport located at 1 Airport Drive, Oakland, California.

Excluded: Professional employees, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39, AFL/CIO.

A. Election Details

The election will be held on Wednesday, April 1,[4] from 1:30 p.m. to 2:30 p.m. in the Napa Conference Room, located on the second floor, Terminal 1 at the Oakland International Airport in Oakland, California.

[4] The election may be rescheduled to a later date.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **March 15, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Thursday, March 19, 2020.** The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.
Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties. A certificate of service must be filed with the Board together with the request for review

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Oakland, California this 17th day of March 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224